No. 2561

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHU TAI NGAN,
Appellant,

vs.

SAMUEL W. BACKUS, Commissioner of Immigration at the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANT.

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Attorneys for Appellant.

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Statement.

This is an appeal from an order sustaining a demurrer to and denying a petition for a writ of habeas corpus in the District Court.

The appellant is a Chinese woman, who was admitted to the United States June 17, 1910, as the wife of a citizen of the United States. On November 20, 1912, she was taken into custody in San Francisco, by immigration officers and after certain proceedings held under the provisions of Sec. 3 of Act of February 20, 1907 (34 Stat. 898, 899, C 1134), her case was submitted to the Secretary of Labor

upon a record, a full copy of which is attached to the petition for a writ of habeas corpus and appears in the Transcript of the Record at pages 11 to 49 inclusive. After a consideration of this record and on December 30, 1912, the Secretary issued a warrant of deportation containing a finding or judgment,

> "that the said alien is a prostitute and has been found an inmate of a house of prostitution and practicing prostitution subsequent to her entry into the United States."

The warrant directs her deportation to China (Trans. of Record, p. 12).

Specification of Error.

We rely on one point as set forth in the petition for a writ of habeas corpus as unfairness and abuse of discretion in the hearing before the Department of Commerce and Labor, to wit:

That the warrant of deportation and the finding or judgment contained therein was not based upon or sustained by any material evidence (subdivision 3, paragraph III, Petition for a Writ of Habeas Corpus, Trans. of Record, pp. 8, 9).

Argument.

LACK OF EVIDENCE.

The petition for a writ of habeas corpus alleges that all of the evidence submitted to the Secretary

is contained in the record attached as an exhibit to said petition (Trans. of Record, pp. 8 and 9). There being no denial of this, the warrant of deportation must be based upon the matter contained in that record.

The record contains nothing showing the manner or place of the appellant's arrest.

The evidence produced by the Government consists of the statements of this appellant (Trans. of Record, p. 18) and of one Kwan So (Trans. of Record, p. 23) taken on Angel Island November 21, 1912, and the statement of A. D. Layne taken by Inspector Robinson at the Police Station in San Francisco, November 27, 1912 (Trans. of Record, p. 27). After the appearance of counsel in the case (Trans. of Record, p. 29), a mass of evidence was submitted on behalf of the detained and is included in the exhibit of the immigration record, appearing in the Transcript of Record at page 11 to page 49, inclusive.

There is no evidence in the statement of the appellant (Trans. of Record, p. 18) even tending to support the finding and judgment of the Secretary. There is no reference at all to this petitioner in the statement of Kwan So (Trans. of Record, p. 23). It cannot be claimed that the application for and the warrant of arrest is evidence. The warrant of deportation is therefore based solely upon the signed statement of A. D. Layne (Trans. of Record, p. 27), and if that statement does not contain evidence sufficient to sustain the finding that the peti-

tioner "is a prostitute and was found an inmate of a house of prostitution and practicing prostitution subsequent to her entry into the United States", then the warrant of deportation is without authority and it was the duty of the lower Court to issue the writ of habeas corpus.

There has been some diversity of opinion in the various circuits as to the extent to which a federal Court should go in reviewing and considering the evidence upon which a warrant of deportation is based in an immigration proceeding. The Courts have not declined in any case to take jurisdiction where *no evidence at all* is produced to sustain the warrant.

In Ex parte Petkos, 212 Fed. 275, the District Court of Massachusetts held that it was unfair and injurious to the petitioner where the immigration authorities acted upon their own mistaken assumption that they knew about a matter of which *there was no evidence.* This is unquestionably the law in all circuits.

As to the *sufficiency* of the evidence and the *extent* to which the Court may go in analyzing the same in habeas corpus proceedings, the Supreme Court in two cases, has placed a most liberal construction on the law in favor of the Court's right to fully consider the evidence as to its *sufficiency.*

Lewis v. Frick, 233 U. S. 291;
Zakonaite v. Wolf, 226 U. S. 272.

In the first case, Lewis v. Frick (supra), the matter came before the Supreme Court on a petition

for a writ of certiorari from the Circuit Court of Appeals, of the Sixth Circuit. It had been taken to the appellate Court by the Government upon an appeal from an order of the Circuit Court of Michigan, S. D., granting a writ of habeas corpus. The order of the Circuit Court had been reversed. The two cases are reported,

Lewis v. Frick, 189 Fed. 146;
Frick v. Lewis, 195 Fed. 693.

There is no difference of opinion between the Courts in these two cases as to their power and duty to review an administrative proceeding under the immigration law where there was not sufficient evidence to sustain the finding and judgment of the immigration authorities. In Lewis' particular case, the Circuit Court held that the evidence *did not sustain* the findings. The Circuit Court of Appeals did not agree with the lower Court. Nor did the Supreme Court. The higher Courts held that the evidence *did* sustain the findings.

Lewis was a Russian who had gone into Canada and who, on his return, had brought with him a woman whom he claimed as his wife. He claimed to have married her in Warsaw, a number of years before. The immigration officers claimed that his story was a fabrication and that he had brought the woman to the United States for immoral purposes. If this finding had been final and conclusive that would have been the end of the matter. But the evidence was discussed and weighed in three Courts with the result that the finding of the immi-

gration officers was upheld, not upon a question of jurisdiction, but upon the question of the sufficiency of the evidence.

In the Supreme Court in Lewis v. Frick, 233 U. S. 291 (supra), the reversing decision of the Circuit Court of Appeals is attacked upon several grounds.

Referring to the point as to the sufficiency of the evidence, the Court says (Lewis v. Frick, supra, 233 U. S. 291-297):

> "The next question is whether there was *sufficient* evidence to *fairly* sustain the finding of the Secretary of Commerce and Labor to the effect that petitioner did on November 17, 1900 import and bring into the United States, a woman for an immoral purpose."

The rule could not be more clearly stated that the Court may take the issue of fact and examine and determine it upon the weight and sufficiency of the evidence considered by the Secretary.

Lewis, the petitioner contended that the woman was his wife. The respondent contended that his story was a fabrication used to conceal the fact that she was a prostitute.

Of the respondent's view the Supreme Court says:

> "There is much evidence to support this view."
>
> Lewis v. Frick, supra, 233 U. S. 291-298.

The Court examines and analyzes the evidence fully, quoting in part, the testimony of the petitioner, Lewis (Lewis v. Frick, supra, 233 U. S. 291, 298, 299, 300).

Concerning the evidence and the Secretary's conclusion therefrom, the Court says:

> "enough appears to show that he was fully justified in concluding as a matter of fact that the whole story of the marriage in Warsaw was a fabrication."
>
> Lewis v. Frick, 233 U. S. 291, 300.

In conclusion the Court says:

> "That being so and there being no contention that the hearing was not fairly conducted the finding of the Secretary upon the question of fact is binding upon the Courts."
>
> Lewis v. Frick, supra, 233 U. S. 291, 300.

In the second case cited, Zakonaite v. Wolf (supra), the petitioner was an alien woman, and, as this appellant, was ordered deported under the authority of Sec. 3 of the Act of February 20, 1907.

In that case, the Supreme Court said:

> "In her behalf, it was contended in the Court below and is here contended that there was *no evidence before the Secretary of Commerce and Labor sufficient* to warrant the findings of fact upon which the order of deportation was based."
>
> Zakonaite v. Wolf, supra, p. 274.

In reference to this contention, the Court further said:

> "As to the first point, an examination of the evidence upon which the order of deportation was based, convinces us that it was *adequate* to support the Secretary's conclusion of fact. That being so, and the appellant having had

> a fair hearing, the findings are not subject to review of the Courts."
>
> Zakonaite v. Wolf, supra, pp. 274, 275.

While in both cases the judgment of the immigration authorities was sustained, it is nevertheless clearly and definitely settled that the Court may and must examine the evidence and determine, not only whether or not there is *any* evidence, but whether or not the evidence produced by the authorities does in reality and in logic sustain the finding and judgment of deportation.

This being so, the question which the Court must consider in the case at bar, is whether or not the statement of A. D. Layne is *sufficient* to sustain the finding and judgment of the Secretary that appellant has been found an inmate of a house of prostitution or practicing prostitution subsequent to her entry into the United States.

That the lower Court was not satisfied with the sufficiency of Layne's affidavit is shown by the opinion and order sustaining the demurrer.

> "The hearing herein was not unfair. The only evidence against the petitioner tending at all to show that she was a prostitute is the affidavit of Arthur D. Layne. The evidence against petitioner contained therein is very slight, but I cannot say that it contains no evidence upon which the Secretary of Labor could base his finding. The demurrer to the petition will therefore be sustained and the application for a writ of habeas corpus denied."
>
> Trans. of Record, p. 53.

In this we say the Court erred.

There must not only be some evidence, but the evidence, whatever it may be, must be sufficient to sustain the finding and judgment of the Secretary. That is clearly the attitude of the Supreme Court in Lewis v. Frick, 233 U. S. 291 (supra). On no other construction of the law, could or would the Supreme Court in that case have taken up and discussed the evidence produced in the immigration proceeding. If the Court was not permitted by law to concern itself with the *weight, sufficiency* and *value* of the evidence, upon what theory did the Court in that case discuss the statement of the Russian, Lewis, concerning his alleged marriage to his woman companion? The fact is that the Court did weigh the evidence and found it to be as the immigration authorities had held—evidence that the Russian had brought the woman in for immoral purposes.

In the case at bar, if we ignore the mass of evidence submitted by the petitioner showing that the police officer, Layne, is mistaken as to the identity of this woman, and if we view his statement in the worst possible light toward this appellant, it can only be taken as evidence that Layne at one time arrested the petitioner and charged her with being an inmate of a house of prostitution.

We call the Court's attention particularly to this statement or affidavit (Trans. of Record, p. 27).

It is ambiguous and sheds no light whatever on the character or life of the woman in question.

He states first that he is a police officer of San Francisco, detailed in the Chinese quarters, and that certain premises, located over a store on Grant Avenue, had the general reputation of being a house of prostitution at the time the statement was made, November 27, 1912, and on March 22, 1912. He then states that certain Chinese highbinder societies were at war, presumably in March, 1912; that he received information that these societies were holding a certain Chinese woman in the premises over the store on Grant Avenue; that he visited the place and found a Chinese woman who gave the name of Di Ung; that he arrested her and *charged* her with being an inmate of a house of prostitution; that she subsequently forfeited $50.00 rather than to be arrested by the immigration officers; and that he saw her with Inspector Robinson on November 20, 1912, at which time she gave the name of Gee Dai, alias Chew Tai Ngan.

In his statement, Layne does not go so far as to say that the woman he arrested was a prostitute, or ever engaged in the practice of prostitution. He merely says he took her away from some warring Chinese societies and placed a charge against her. In fact, she may have been a hostage, or she may have been abducted as a measure of hostility. Layne states that she was *held* in the premises by the warring clans. It is mere guesswork to speculate as to the reasons *why* she was so held. The immigration authorities may not assume to know about a matter of which there is no evidence.

Ex parte Petkos (supra).

As to the identification of this appellant, it does not appear that the appellant was taken before Layne or that her photograph was exhibited to him. It does not even appear that the woman who was with Robinson and gave the name of Gee Dai, alias Chew Tai Ngan, is in fact this appellant. This appellant when she was examined at Angel Island, November 21, 1912, gave the following answer to the following:

"Q. What is your name?
A. Jee Dai Ngan.
Q. Any other names?
A. That is the only name I have."

The application for and warrant of arrest and the warrant of deportation name the appellant as Chu Tai Ngan (Trans. of Record, pp. 17 and 12). At the best, the situation is confusing, and the immigration officers made no endeavor to clear the matter by further evidence. There is nothing in the evidence submitted by the appellant by way of defense (Trans. of Record, pp. 31 to 49 inclusive), which tends to support the Secretary's finding. If it had any value, it merely supported the appellant's contention before the Department of Labor that she is not the Di Ung who was arrested by Layne.

The fact that Layne was a police officer adds nothing to the value of his affidavit. The fact that he was in charge of the police system in the San Francisco Chinese quarters might raise the presumption that he knew more concerning the denizens of that district than did others. If this be so,

it reduces the value of his testimony upon the legal theory so well expressed in the maxims *expressio unius est exclusio alterius* and *expressum facit cessare tacitum*. In other words, the immigration authorities went to him for proof that this appellant was a prostitute. In his affidavit he told them all that he could, and the facts therein set forth are to the exclusion of all others and to the exclusion of all implications. If he knew that she was a prostitute he would have said so; if he had believed it, he would have expressed his opinion. The presumption is that he neither knew nor believed the woman to be a prostitute.

> "If there is no evidence that an alien immigrant is within one of the excluded classes, the immigration authorities have no power to exclude him, and order for his deportation is a nullity and he is entitled to discharge from detention thereunder on a writ of habeas corpus."
>
> U. S. ex rel. Klein v. Williams, 189 Fed. 915.

The evidence in this case on which the order of deportation was based, was carefully examined and fully considered as to its adequacy and sufficiency by the Court.

In the opinion Judge Holt of the District Court S. D. New York, says:

> "In my opinion there is no evidence in this case that either of these aliens is within any of the excluded classes."
>
> U. S. ex rel. Klein v. Williams, supra, p. 918.

The Courts may on habeas corpus review the decision of the Secretary of Labor in an immigration case unless it was based on sufficient evidence and the hearing was fair.

U. S. v. Chin Len, 187 Fed. 544;
U. S. ex rel. Geigow v. Uhl, 215 Fed. 573-575.

In the last case, the Circuit Court of Appeals of the Second Circuit says:

> "Congress has placed the determination of these questions in the hands of trained officials and their conclusions upon *disputed questions* of fact are final and conclusive. It is only in the very rare instance that a finding is without *proof* to support it that the Courts may interfere."

It is our claim that the case at bar is one of the rare instances where there is *no proof* to *support* the Secretary's finding against this appellant. We do not dispute the veracity of Layne. We assert that his statement is not evidence or proof that this appellant ever practiced prostitution or was an inmate of a house of prostitution.

The doctrines announced in these few last mentioned cases has been reasserted with much more force and breadth by the Supreme Court in the cases cited (Lewis v. Frick, 233 U. S. 291, supra; and Zakonaite v. Wolf, supra), and any doctrine to the contrary that may appear in any other case reported is erroneous and must fall.

We respectfully represent that the order of the District Court sustaining the demurrer to and dis-

charging the petition for a writ of habeas corpus be reversed and that the writ of habeas corpus issue as prayed for.

Dated, San Francisco,
May 12, 1915.

CATLIN, CATLIN & FRIEDMAN,
Attorneys for Appellant.